Ipmuda Trading Sdn Bhd v Khoo Kiat Piau t/a Ying's Trading Co & Anor

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12-12-1995
AUGUSTINE PAUL JC
30 AUGUST 1996

Civil Procedure *— Affidavit — Affidavit of service — Absence of affirmation by commissioner for oaths — Whether affidavit defective — Whether defect was a mere irregularity — Subordinate Courts Rules 1980 O 25 rr 22(7) & 25*

The plaintiff/appellant ('the appellant') made an application dated 12 August 1993 to the Sessions Court at Melaka for leave to make an order of committal against the respondents for breach of an order dated 29 December 1986 ('the High Court order'). The application for leave having been granted by the sessions court, the appellant filed its application for the committal order in the same court on 22 September 1993. The second respondent contended that he had not been served with the High Court order on the ground that the affidavit of service was defective as it was not affirmed before a commissioner for oaths. The appellant claimed that the High Court order was duly served by personal service on the defendants/respondents ('the respondents') on 15 January 1987. The affidavit of service of the High Court order however did not contain the signature of the commissioner for oaths. The learned sessions court judge dismissed the application on the ground that the respondents had not been served with the High Court order. The appellant appealed to the High Court against the validity of the decision of the sessions court.

Held, dismissing the appeal:

(1) The principal element that required proof was that the High Court order was served on the respondents as required by O 30 r 5(1) of the Subordinate Court Rules 1980 ('the SCR 1980') or that they had notice of it as specified in O 30 r 6 of the SCR 1980 (see p 643G).

(2) The only evidence that the appellant relied upon to prove service of the High Court order on the respondents was the affidavit of service annexed to the application to make the contempt order. This was defective as it had not been affirmed before a commissioner for oaths contracy to O 25 r 22(7) of the SCR (see p 643H).

(3) Such defect in the affidavit of service was not an irregularity in the form of the affidavit but was one that went to the substance of it as the absence of the signature of the commissioner for oaths meant that the document was not sworn as required and was therefore not an affidavit (see p 644B–C).

(4) The affidavit of service did not qualify as an affidavit for the purpose of proving service of the High Court order. This assumed greater significance in the light of the fact that the standard of proof on the appellant to prove service in this application for a committal order was beyond reasonable doubt. It followed therefore that the service of the High Court order had not been proved (see p 644C–D).

Obiter

Since the High Court order was made by the High Court, any consequential action to be taken on it must be in the High Court itself and not in a court subordinate to it. This was particularly significant as the validity of the High Court order itself might be challenged and the sessions court would have no power to rule on it. Each tier of the judicial system had been entrusted with separate and specific powers to deal with contempt. The sessions court in this case therefore had no jurisdiction to entertain the application for contempt (see p 644E–F); *Karam Singh v Karpal Singh* [1988] 2 MLJ 603 followed.

[Bahasa Malaysia summary

Plaintif/perayu ('perayu tersebut') telah membuat permohonan bertarikh 12 Ogos 1993 di Mahkamah Sesyen Melaka untuk kebenaran membuat satu perintah komital terhadap penentang atas kemungkiran satu perintah bertarikh 29 Disember 1986 ('perintah Mahkamah Tinggi tersebut'). Permohonan kebenaran tersebut telah diberikan oleh mahkamah sesyen dan perayu telah memfailkan permohonan untuk perintah komital di mahkamah yang sama pada 22 September 1993. Penentang kedua telah menghujahkan bahawa beliau telah tidak disampaikan dengan perintah Mahkamah Tinggi tersebut atas dasar bahawa afidavit penyampaian adalah cacat oleh sebab ianya tidak diikrarkan di hadapan pesuruhjaya sumpah. Perayu telah menyatakan bahawa perintah Mahkamah Tinggi tersebut telah disampaikan dengan wajarnya melalui penyampaian ke diri ke atas defendan/penentang ('penentang tersebut') pada 15 Januari 1987. Bagaimanapun, afidavit penyampaian perintah Mahkamah Tinggi tersebut tidak mengandungi tandatangan pesuruhjaya sumpah. Hakim mahkamah sesyen yang bijaksana telah menolak permohonan perayu dengan alasan bahawa perintah Mahkamah Tinggi tersebut telah tidak disampaikan ke atas penentang. Perayu telah merayu kepada Mahkamah Tinggi terhadap kesahan keputusan mahkamah sesyen tersebut.

Diputuskan, menolak rayuan:

(1) Elemen utama yang perlu dibuktikan adalah bahawa perintah Mahkamah Tinggi tersebut telah diserahkan kepada penentang seperti yang dikehendaki oleh A 30 k 5(1) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR 1980') ataupun bahawa mereka

telah menerima notis seperti yang diperuntukkan oleh A 30 k 6 KMR 1980 (lihat ms 643G).

(2) Perayu hanya menggunakan afidavit penyampaian seperti yang dilampirkan kepada permohonan untuk perintah komital sebagai bukti bahawa perintah Mahkamah Tinggi tersebut telah disampaikan ke atas penentang. Bagamanapun, afidavit penyampaian tersebut adalah cacat kerana ianya tidak diikrarkan di hadapan pesuruhjaya sumpah bertentangan dengan A 25 k 22(7) KMR 1980 (lihat ms 643H).

(3) Kecacatan sedemikian di dalam afidavit penyampaian tersebut bukanlah hanya suatu luar aturan dalam bentuk afidavit tersebut, tetapi sesuatu yang membawa kesan kepada asas afidavit tersebut kerana dengan ketiadaan tandatangan pesuruhjaya sumpah, ini bermakna bahawa dokumen tersebut telah tidak diikrarkan seperti yang dikehendaki dan oleh yang demikian ianya bukanlah suatu afidavit (lihat ms 644B–C).

(4) Afidavit penyampaian tersebut tidak layak menjadi suatu afidavit untuk membuktikan bahawa perintah Mahkamah Tinggi tersebut telah disampaikan. Ini mengambil kedudukan yang lebih penting kerana darjah pembuktian bagi perayu membuktikan penyampaian di dalam permohonan ini untuk satu perintah komital adalah melampaui keraguan munasabah. Oleh kerana itu, penyampaian perintah Mahkamah Tinggi tersebut telah tidak dibuktikan (lihat ms 644C–D).

Obiter

Oleh kerana perintah Mahkamah Tinggi tersebut dibuat oleh Mahkamah Tinggi, sebarang tindakan seterusnya mestilah diambil di Mahkamah Tinggi dan bukan di mahkamah yang rendah daripadanya. Ini adalah penting terutamanya kerana kesahan perintah Mahkamah Tinggi tersebut boleh dicabar dan mahkamah sesyen tidak mempunyai kuasa untuk memutuskannya. Setiap peringkat sistem kehakiman telah diberikan kuasa-kuasa yang berasingan dan tertentu untuk membicarakan kes-kes penghinaan. Oleh itu, mahkamah sesyen di dalam kes ini tidak mempunyai bidang kuasa untuk mengadili permohonan tersebut (lihat ms 644E–F); *Karam Singh v Karpal Singh* [1988] 2 MLJ 603 diikut.]

Notes

For a case on defective affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue), para 193.

Cases referred to

Eddowes v Argentine Loan & Agency Co (1890) 59 LJ Ch 392
Fairclough & Sons v Manchester Ship Canal Co (No 2) (1897) 41 Sol Jo 225
Graham v Ingleby (1848) 1 Exch 651

Grenek Sdn Bhd v Lew Wa Chow (2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 794)
Husson v Husson [1962] 3 All ER 1056
Karam Singh Veriah v Karpal Singh [1988] 2 MLJ 603
Polygram Records Sdn Bhd & Ors v Phua Tai Eng [1986] 2 MLJ 87
R v Bloxham (1844) 6 QB 528
R v Norbury (1846) 6 QB 534
Shoppee v Nathan & Co [1892] 1 QB 245
Tay Seng Keng v Tay Ek Seng Co Sdn Bhd [1978] 1 MLJ 126

Legislation referred to

Rules of the High Court 1980 O 52 r 1(3)
Subordinate Court Rules 1980 O 25 rr 22(7), 25, O 30 rr 5, 7, O 34

Appeal from: Summons No GS 24–1/88 (Sessions Court, Melaka).

CS Poh (Chong & Poh) for the appellant.
Respondents absent.

Augustine Paul JC: Ipmuda Trading Sdn Bhd, the plaintiff in the court below and appellant before me, made an application dated 12 August 1993 to the Sessions Court at Melaka for leave to make an order of committal against Khoo Kiat Piau t/a Ying's Trading Co and Fauzi bin Haji A Majid ('the respondents'). The application was supported by an affidavit affirmed by one Ronnie GC Yeoh. Paragraphs 6 to 9 of the affidavit which are relevant for the purposes of the application read as follows:

> 6 Melalui suatu perintah yang dikeluarkan oleh Mahkamah Tinggi Ipoh bertarikh 29 Disember 1986, defendan-defendan telah dihalang dari menerima wang dari Jabatan Kerja Raya dan/atau Pengarah Kerja Raya, Melaka untuk jumlah sehingga RM45,000. Sesalinan perintah bertarikh 29 Disember 1986 tersebut dilampirkan dan ditanda sebagai eks RY1.
>
> 7 Perintah bertarikh 29 Disember 1986 telah diserahkan kepada kedua-dua defendan pertama dan kedua secara penyampaian ke diri pada 15 Januari 1987. Sesalinan afidavit penyampaian oleh Lim Teck Koon yang diikrarkan pada 22 Jun 1987 dilampirkan dan ditanda sebagai eks RY2.
>
> 8 Saya telah difahamkan oleh peguamcara plaintif bahawa pihak defendan sebagai kontraktor untuk suatu projek Jabatan Kerja Raya Melaka telah menerima pembayaran untuk projek tersebut pada 6 April 1988, dan perkara ini telah disahkan oleh pihak Jabatan Kerja Raya Melaka melalui surat bertarikh 21 Mei 1991 yang dialamatkan kepada peguamcara plaintif. Sesalinan surat bertarikh 21 Mei 1991 tersebut dilampirkan dan ditanda sebagai eks RY3.
>
> 9 Dengan menerima pembayaran yang dinyatakan di perenggan 8 di atas maka defendan telah mengingkari suatu perintah mahkamah.

The material parts of the order of court ('the High Court order') that the respondents were alleged to have breached are as follows:

> Before The Honourable Mr Justice
> Anuar bin Dato' Zainal Abidin
> This 29 December 1986 In Chambers
>
> Order
>
> Upon Reading the summons-in-chambers (encl 8) dated 26 December 1986 and the affidavit of Wong Mei Fong (f) affirmed on 24 December 1986 And Upon Hearing Mr CS Poh of counsel for the plaintiff abovenamed and the plaintiff by his undertaking to abide by any order the court or a judge may make as to damages in case the court or a judge should hereafter be of the opinion that the defendants shall have sustained any (sic) by reason of this order which the plaintiff ought to pay.
>
> It Is Ordered that the defendants whether by themselves, their servants and/or agents or otherwise be restrained from receiving monies due from Jabatan Kerja Raya and/or Pengarah Kerja Raya, Melaka or all of them to the defendants in the sum to the extent of RM45,000.
>
> And It Is Ordered that the order made herein together with this summons and affidavits in support be served on the defendants and all interested parties.

Mr Ronnie GC Yeoh said in para 7 of his affidavit that the High Court order was served on the respondents on 15 January 1987. An affidavit of service of the High Court order was annexed to his affidavit. The material parts of the affidavit of service for the purposes of this appeal read as follows:

> That I did on 15 January 1987 indorse on the said order the day of the month and the week of the said service on the said Khoo Kiat Piau and Fauzi bin Haji A Majid.
>
> Affirmed by the said)
> Lim Teck Khoon at Melaka) sgd illegible
> this 22 June 1987)
> at 10.50am)
>
> Before me,
>
> .....
> Commissioner for Oaths.
> (LJ Fernandis, PIS)
> Pesuruhjaya Sumpah,
> Commissioner For Oaths
> Melaka.

The application for leave having been granted by the sessions court, the appellant filed its application for the committal order in the same court on 22 September 1993. At the hearing of the application, oral evidence was adduced before the learned sessions court judge. The appellant called one witness while both the respondents gave evidence. The appellant's sole witness was En Abdul Razak bin Rahmat, an assistant director of Jabatan Kerja Raya. The application was dismissed by the learned sessions court

judge on 9 June 1995 and it is against this order that the appellant now appeals. For ease of reference the Subordinate Courts Rule 1980 shall be referred to as the SCR 1980 in this judgment.

In her grounds of judgment the learned sessions court judge said that the evidence adduced showed that the second respondent is the sole proprietor of Syarikat Pembinaan Molek. This company had a contract with Jabatan Kerja Raya for which a payment was due. Jabatan Kerja Raya made the payment direct into the account of the company after the appellant had obtained the High Court order. This, the sessions judge said, did not amount to the second respondent breaching the terms of the High Court order. She also upheld the second respondent's contention that he had not been served with the High Court order on the ground that the affidavit of its service, the material parts of which had been reproduced earlier, was defective as it was not affirmed before a commissioner for oaths. With regard to the first respondent, she said that there was no evidence to show that he had received any payment.

I shall deal with the validity of the order made by the learned sessions court judge after having briefly dealt with the relevant parts of the law relating to committal proceedings for the purpose of the appeal before me.

It is a civil contempt of court to refuse or neglect to do an act required by a judgment or order of the court or to disobey a judgment or order requiring a person to abstain from doing a specified act. This is provided for by O 30 r 5(1) of the SCR 1980, the material parts of which read as follows:

> 5(1) Where:
>
> (a) ...
>
> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,
>
> then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say:
>
> (i) with the leave of the court, an order of committal;
>
> (ii) ...
>
> (iii) ...

Rule 7(2) of the same order provides that an order shall not be enforced under r 5 unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. Rule 7(6) and (7) are worthy of mention. They read as follows:

> (6) An order requiring a person to abstain from doing an act may be enforced under r 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either:
>
> (a) by being present when the order was made; or
>
> (b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

A (7) Without prejudice to its powers under O 7 r 18, the court may dispense with service of a copy of an order under this rule if it thinks just to do so.

Although a person cannot be held guilty of contempt in infringing an order of the court of which he knows nothing, Lyell J said *Husson v Husson* B [1962] 3 All ER 1056, that a distinction is to be drawn between mandatory and prohibitory orders and added:

> An order requiring a person to do an act must be served on him. If it is not served, committal proceedings for breach of the order do not lie. If, however, the order is to restrain the doing of an act, the person restrained may be committed for breach of it if he in fact has notice of it, either by his presence C in court when it is made, or by being served with it, or notified of it by telegram or in any other way.

Where a judgment or order has been served on a person or he has had notice of it as provided by the rules then a breach of it may be enforced by an order of committal. Order 34 of the SCR 1980 governs the procedure D for making such an order. Although contempt may be committed in the absence of wilful disobedience on the part of the contemnor, committal will not be ordered unless the contempt involves a degree of fault or misconduct (see *Shoppee v Nathan & Co* [1892] 1 QB 245). Thus accidental or unintentional disobedience is not sufficient to justify committal E (see *Fairclough & Sons v Manchester Ship Canal Co (No 2)* (1897) 41 Sol Jo 225). A flaw in an order of court may entitle a contemnor to be discharged from the contemptuous act (see *Grenek Sdn Bhd v Lew Wa Chow* (2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 794). In proceedings of this nature the standard of proof is beyond reasonable doubt (see *Polygram Records Sdn Bhd & Ors v Phua Tai Eng* [1986] 2 MLJ F 87). In *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126 the Federal Court held that as the evidence in the contempt proceedings consisted of affidavits from both sides it was quite impossible to say on a mere consideration of such affidavits that the guilt of the contemnor had been proved beyond reasonable doubt.

G The principal element that requires proof by the appellant is that the High Court order was served on the respondents as required by O 30 r 5(1) of the SCR 1980 or that they had notice of it as specified in r 6 of the same order. Rule 6 has no application as no evidence was adduced to show that the respondents had notice of the High Court order. The only evidence that the appellant relied on to prove service of the High Court order on the H respondents is the 'affidavit of service' annexed to the application to make the contempt order. This, as found by the learned sessions judge, is defective as it has not been affirmed before a commissioner for oaths. Order 25 r 22(7) of the SCR clearly provides that:

> Every affidavit must be signed by the deponent and the jurat must be I completed and signed by the person before whom it is sworn.

It must be noted that r 25 of the same order provides that:

> An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof. A

A defective affidavit may be allowed to be used only if the court is satisfied that the affidavit had been sworn before the person who had signed the jurat (see *Eddowes v Argentine Loan & Agency Co* (1890) 59 LJ Ch 392). Even in cases where the affidavit had been signed by the person before whom it was sworn without the words 'Before me' in the jurat, the defect was held to be fatal (see *R v Bloxham* (1844) 6 QBD 528; *R v Norbury* (1846) 6 QBD 534; *Graham v Ingleby* (1848) 1 Exch 651). It therefore follows that the defect in the 'affidavit of service' that I have adverted to is not an irregularity in the form of an affidavit but is one that goes to the substance of it as the absence of the commissioner for oath's signature means that the document was not sworn as required and is thereby not an affidavit. The 'affidavit of service' therefore does not qualify as an affidavit for the purpose of proving service of the High Court order. This assumes greater significance in the light of the fact that the standard of proof on the appellant to prove service is beyond reasonable doubt. Accordingly, the application made by the appellant must fail as service of the High Court order has not been proved. B C D

There is one other matter to which I would like to refer. It goes to the root of the proceedings before the learned sessions court judge. Before making a ruling on this issue I invited learned counsel to submit on it. Did she have jurisdiction to entertain the application? It must be observed that the High Court order was made by the High Court. Accordingly, any consequential action to be taken on it must be in the High Court itself and not in a court subordinate to it. This is particularly significant as the validity of the High Court order itself may be challenged and the sessions court will have no power to rule on it. Every tier of the judicial system has been entrusted with separate and specific powers to deal with contempt. In the case of the subordinate courts it is O 34 of the SCR 1980. In the case of the High Court, O 52 r 1(3) of the Rules of the High Court 1980 clearly states that: E F

> Where contempt of court is committed in connection with any proceedings in the High Court, an order of committal may be made by a judge of the High Court. G

In commenting on the equivalent provision in the English Rules of the Supreme Court, 9 *Halsbury's Laws of England* (4th Ed) para 93 has this to say: H

> The jurisdiction to commit a person for disobeying a judgment or order vests in the court whose judgment or order has been disobeyed and an application for committal must be made to the appropriate court.

In *Karam Singh Veriah v Karpal Singh* [1988] 2 MLJ 603 it was held that an application for an order of committal should be made in the court where the contempt was committed. In the premises I was of the view that the sessions court had no jurisdiction to entertain the application for I

contempt. I therefore dismissed the appeal and made no order as to costs as the respondents were not present to argue their case.

Appeal dismissed.

Reported by Lew Chee Seong